Supreme Court, U.S.
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No. 02-1758

In The

Supreme Court of the United States

ASHLEY CREEK PHOSPHATE CO.,

Petitioner,

v.

CHEVRON U.S.A. INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

CHEVRON'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED[1]

1. Should the established rule that requires an antitrust plaintiff to demonstrate intent and preparedness to enter a prospective business when he or she is seeking to recover lost profits from that inchoate business be abolished or altered? This rule dates back to 1908, there is absolutely no conflict amongst the United States courts of appeals as to the rule, and the rule efficiently addresses the need for antitrust standing.

2. Did this plaintiff, who was seeking to recover lost profits for a prospective mining business allegedly thwarted by an antitrust violation, lack standing because of a lack of demonstrated preparedness? In this case, the plaintiff never determined during the alleged violation whether there was a market for its mineral, what price it could have charged, what its costs would be or what its reliable mineral reserve was and the plaintiff did not demonstrate any capability to finance or enter the business.

3. Can a plaintiff, seeking to recover lost profits for a prospective business allegedly thwarted by an antitrust violation, prove an antitrust injury (as required to have standing) merely by the ownership of property that it claims it would have used to develop the business, without proving demonstrated intent and preparedness to enter the business?

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[1] The Chevron Respondents object to Petitioner's "Questions Presented." Petitioner's "Questions" raise issues not addressed below, misstate the record, and misstate the decisions Petitioner seeks to have reviewed.

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STATEMENT OF THE CASE

I. INTRODUCTION

The Chevron Respondents,[2] defendants below, set forth this Statement of the Case to demonstrate the lack of a basis to grant Petitioner Ashley Creek Phosphate Company's ("Ashley") Petition for Writ of Certiorari ("Petition"), and to satisfy their obligation to correct Ashley's numerous misstatements of the record.[3]

Between May 1986 and April 1992, Chevron owned and operated a pipeline used to transport phosphate concentrate from its phosphate mine near Vernal, Utah to its phosphate fertilizer plant at Rock Springs, Wyoming. Ashley, plaintiff below, claimed that the pipeline was an "essential facility" needed to access a railhead at Rock Springs and that Chevron violated the antitrust laws by allegedly refusing to offer reasonable tariffs for the pipeline. Ashley claimed that, as a result of the allegedly excessive pipeline tariffs, it was prevented from developing a phosphate mine on two phosphate mining leases it owned near Vernal. Ashley further claimed that it intended to use the pipeline to ship phosphate concentrate to Rock Springs, and sell the concentrate to one or more of the phosphate fertilizer producers located in the western

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[2] The Chevron Respondents consist of: Chevron Corporation; Chevron U.S.A. Inc.; Chevron Chemical Company; Chevron Pipe Line Company; and Chevron Industries, Inc. "Chevron" is used herein to refer to one or more of the Chevron Respondents.

[3] Ashley misstates the record rather than demonstrate any genuine disputes as to material facts. Ashley continues to misstate the record despite the adverse findings of the District Court, which were affirmed by the Court of Appeals.

United States and Canada. **Ashley did not intend to build its own fertilizer plant and compete directly with Chevron in the fertilizer business.** Ashley sought to recover lost profit damages for its allegedly thwarted mining venture under Section 4 of the Clayton Act, 15 U.S.C. § 15 ("Section 4").

The Tenth Circuit Court of Appeals ("Court of Appeals") affirmed the United States District Court for the District of Utah's ("District Court") grant of Respondents' motions for summary judgment on the grounds that Ashley could not satisfy the long-settled antitrust standing rule that requires a plaintiff seeking to recover lost profits for a prospective business allegedly thwarted by an antitrust violation to prove its demonstrated "intent and preparedness" to compete. The District Court and the Court of Appeals assumed Ashley's intent to compete, but determined that Ashley had failed to undertake even the most basic preparatory steps, including determining whether there was a market for its phosphate, even assuming a zero pipeline tariff.

The District Court and the Court of Appeals also determined that Ashley's possession of its phosphate leases was not itself sufficient to provide Ashley standing, because Ashley sought to recover lost profits for an allegedly thwarted prospective business that would have used the leases, rather than for any injury to the leases themselves.[4]

[4] The District Court also decided that the pipeline tariffs were not exclusionary under a tariff reasonableness analysis provided by the Surface Transportation Board for the pipeline. The Court of Appeals did

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II. FACTUAL BACKGROUND

A. Chevron's Development Of Its Phosphate Fertilizer Project

Phosphate and sulfur are required for the production of phosphate fertilizer. In the early 1980's, Chevron was about to obtain a large supply of sulfur as a by-product from its Wyoming natural gas project then under development. The sulfur was, in effect, a contaminant that had to be removed from the natural gas. Chevron could dispose of this sulfur, try to sell it, or use it to make something. Chevron decided to use this sulfur to make phosphate fertilizer and enter the phosphate fertilizer market.

Chevron's first step to develop its phosphate fertilizer project was its 1981 acquisition of an operating phosphate mine located near Vernal, Utah. The existing mine supplied phosphate concentrate by truck to a small, captive phosphate fertilizer plant located near Salt Lake City, Utah, and by truck and rail to Cominco, a phosphate fertilizer producer located in British Columbia. There was no pipeline. Chevron chose to site its fertilizer plant in Rock Springs, Wyoming because Rock Springs was a railhead and geographically convenient to the Wyoming sulfur and the Utah phosphate.

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not reach this issue, having decided Ashley lacked antitrust standing. Two of Ashley's "Questions Presented" relate to this aspect of the District Court's decision. However, Chevron does not address the District Court's rate reasonableness decision, since the case was decided on standing. Ashley merely argues that the District Court committed error, rather than state a basis for certiorari as to that issue.

Chevron decided to build a pipeline from its mine in Vernal, Utah to its fertilizer plant in Rock Springs, Wyoming because of the volume of material that it would be shipping. Trucking the material would have been cheaper, but the mountainous terrain and number of miles of non-interstate highways involved would have created a public relations disaster. The local highways are heavily used by vacationers and other recreationalists and would have been clogged with Chevron trucks because of the volume of concentrate required by the fertilizer plant. The pipeline also eliminated the potential of traffic accidents and was more reliable in the winter. Trucking, however, remained a viable option for smaller quantities of phosphates and Ashley never demonstrated what amount of concentrate it could have sold.[5] By May 1986, Chevron had completed its phosphate fertilizer project, which consisted of an expansion of the existing Vernal mine, a phosphate fertilizer plant near Rock Springs, Wyoming, and an approximately 90-mile pipeline to transport phosphate concentrate in slurry form from the mine to the plant.[6]

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[5] Ashley argued below that no trucking was possible from Vernal because, in 1986, the State of Utah was going to terminate Chevron's special overweight permits by which it trucked phosphate from Vernal. However, the State of Utah did not intend to, and did not, prohibit all trucking from Vernal. It was only terminating Chevron's special overweight trucking. The fact that trucking remained possible and economical after the pipeline started is demonstrated by both the bid that Chevron received from its trucking vendor to continue trucking under regular overweight permits and the same trucking vendor's solicitation of Ashley's business (to which Ashley never responded).

[6] While shipping the phosphate concentrate in slurry form was cost effective for supplying the Rock Springs plant, it was not cost effective for shipping concentrate for third-party sales. Whereas the slurry could be fed directly to the plant, it had to be dried to be shipped for third-party

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B. Chevron's Experience Showed The Lack Of Demand For A New, Stand-Alone Western Phosphate Mine

During the time Chevron owned and operated the pipeline, the potential market for phosphate concentrate from phosphate mines located in the western United States was limited to the eight phosphate fertilizer producers (including Chevron) located in the western United States and Canada.[7] These fertilizer producers satisfied their phosphate concentrate requirements either from captive mines, under long-term supply contracts with third-party mines, or (for Cominco) a combination of the two.

Chevron made repeated efforts to generate phosphate concentrate sales from the Vernal mine to the other western phosphate fertilizer producers because such sales would have increased its revenues and enabled it to reduce its per unit production costs at the mine. However, despite its efforts, Chevron could not economically offer a price that would match what the other western phosphate fertilizer producers were paying for their phosphate concentrate. Chevron's third-party sales remained limited to sales to Cominco pursuant to a contract it had inherited when it acquired the Vernal mine.

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sales. The drying operation, and the handling of the extremely fine powdered phosphate that resulted, proved to be very costly.

[7] Phosphate mines located in the western United States (which produced only 6-12% of the total phosphate concentrate produced in the United States) could not compete on a delivered cost basis (*i.e.*, cost of product plus cost of delivery) with Florida mines anywhere other than the western United States and Canada.

Chevron's sales to Cominco constituted the only third-party sales of phosphate concentrate from any phosphate mine located in the western United States. These sales were limited to approximately 350,000 tons of concentrate in 1986, less than 250,000 tons in 1987, and they stopped in July 1988. Cominco stopped purchasing concentrate from Chevron in July 1988, 26 months after the pipeline went on-line, because Cominco had expanded its own mine, which allowed it to produce all of its phosphate concentrate requirements at a cost lower than the price Chevron could offer.

From July 1988 onward, despite available unused capacity both at the Vernal mine and on the pipeline and Chevron's renewed attempts to generate third-party sales, ***the pipeline was not used to ship concentrate for third-party sales***. Chevron used only 1/3 of the pipeline capacity to supply the Rock Springs plant. From July 1988 onward, ***there were no third-party sales of phosphate concentrate from any mine located in the western United States***. Instead, from July 1988 onward, all western phosphate fertilizer producers satisfied all of their phosphate concentrate requirements from their own captive mines (six of the eight western producers) or under long-term sales contracts with mines located in Florida (two of the eight western producers).

Despite the availability of undeveloped western phosphate deposits (including deposits located closer to railheads than Ashley's deposit), no new phosphate mines were developed in the western United States during the time Chevron owned and operated the pipeline. During that time, not a single phosphate mine in the western United States was owned or operated on a stand-alone

basis. Instead, all such mines were part of integrated fertilizer operations.

C. Chevron Exited The Phosphate Market At A Huge Loss

Chevron had gone ahead with its phosphate fertilizer project, in part, upon the assumption that phosphate fertilizer prices would increase during the late 1980's and early 1990's. This assumption proved wrong and phosphate fertilizer prices continued to decrease while Chevron was in this business. After operating the phosphate fertilizer project at a loss each year for six years, Chevron sold the project to certain of the SF Respondents in 1992 for $63.5 million.[8] This sale was at a substantial loss as Chevron had invested approximately $371 million of capital in the project.

D. Ashley's Background And Lack Of Capability

Ashley is the only third-party to ever claim it needed access to the pipeline. Yet, Ashley never has been in the business of mining or selling phosphate concentrate, or any other business. Ashley never has had any paid employees and has no credit history. Ashley's sole assets are two State of Utah phosphate leases, which provide Ashley the right to mine phosphate on land located near the existing Vernal mine. Its sole principal, John Archer, operates Ashley part time from his house and pays its bills.

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[8] The SF Respondents are: SF Pipeline Limited Company; SF Phosphates Limited Company; Farmland Industries, Inc.; and J.R. Simplot Company. The SF Respondents are filing a separate Opposition to the Petition.

Mr. Archer never has developed or operated a mine and never has sold phosphate concentrate or any other mineral.

Although he never has developed or operated a mine, Mr. Archer has sold mineral leases, and has a long history of failed attempts to sell and get others to develop the two subject phosphate leases. Mr. Archer first acquired the subject phosphate leases from the State of Utah in 1963 and immediately sold them to Mountain Fuel Supply Company. Mountain Fuel failed to develop a mine and instead allowed the leases to lapse. Mr. Archer reacquired the leases in 1974 and sold them to Utah International in 1975. Utah International also failed to develop a mine after determining that development was not feasible. Utah International re-assigned the leases to Mr. Archer in 1984, at which time he formed Ashley to hold the leases. Mr. Archer then proceeded to attempt to sell the leases to Chevron and Cominco, both of which declined. Mr. Archer subsequently attempted to sell the leases to Cominco's successor, Agrium, which as late as 1997 declined.

E. Ashley's Failure To Attempt Development

During the time Mr. Archer was trying to sell the leases to Cominco, in the spring of 1985, Ashley's then-part time mining consultant, David Aro, proposed to Mr. Archer an exploration program for Ashley's leases that summer. Mr. Aro told Mr. Archer that the proposed program "will be essential to the preliminary design of the plant and for the mine planning. **Anything less than this will leave you with insufficient data to complete your plans for the leases.**" (Emphasis added.)

However, despite the fact that no pipeline tariffs were due or published, Ashley failed to go forward with this

"essential" exploration program either in 1985 or any time prior to Chevron's sale of the phosphate fertilizer project in 1992. Without the program, Ashley: (1) had not verified that its leases contained "proven reserves," as necessary to obtain financing; (2) had no baseline data and so was unable to determine its operating and capital expenses; and (3) had not performed any testing or studies necessary to take its process design beyond the purely "conceptual" stage.[9]

Ashley's only "feasibility" study was a "very preliminary" March 1985 study performed by Mr. Aro. This study: (1) failed to determine Ashley's capital or operating expenses to within a 25% margin of error; (2) used an entirely arbitrary sales volume number of 1 million tons per year, whereas the total third-party sales of phosphate concentrate from all western mines – Chevron's sales to Cominco – were less than 250,000 tons in 1987 and non-existent after July 1988; and (3) used a $44 per ton sales price that was not based upon any contract or market study, but which Mr. Aro testified before the ICC was a "meaningless price" and which was ***$24 per ton higher*** than the price Cominco told Chevron it would have to beat

[9] Ashley misstates the record when it asserts that, by 1986, it "had explored and tested its properties, demonstrating their suitability, [and] preliminarily designed a mine and processing plant." [Petition at 3.] Neither before 1986 nor any time prior to Chevron's sale of the pipeline did Ashley conduct the "essential" exploration program that Mr. Aro proposed in 1985. Thus, Ashley did not verify that it had "proven reserves." Nor did it determine its stripping ratio, its ore quality, or its capital and operating costs. Ashley never determined if there was a market for its product at an economically feasible price. Thus, Ashley never was able to determine that the leases were "suitable" for development.

in 1988 for Cominco to continue to purchase from Chevron.[10]

According to Mr. Aro, his 1985 study was a "very preliminary" Type 1 study under a feasibility study classification system used in the mining industry. A Type 1 study is the most preliminary level, that "generally describes a hypothetical installation," but is "seldom adequate for positive acceptance of a project." At least a Type 3 study is needed to obtain financing. By 1989, Messrs. Aro and Archer agreed that the 1985 study was "badly out of date and in need of updating" and "is no longer defensible." As late as October 1991, Mr. Aro informed Mr. Archer that Ashley lacked sufficient data to perform even a Type 2 study.[11]

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[10] Ashley misstates the record when it asserts that, by 1986, Ashley "performed a preliminary feasibility study showing profitability of an operation selling phosphate concentrate through Rock Springs railhead to fertilizer plants competing with the new Chevron plant in the 'Western market' for phosphate fertilizer." [Petition at 3.] Ashley performed no feasibility study before 1986 or at any time that showed profitability of a mining venture selling phosphate concentrate in the western United States beyond the completely hypothetical 1985 study by Mr. Aro which he and Mr. Archer later admitted was "indefensible."

[11] Ashley misstates the record when it asserts that there is "voluminous uncontested evidence in this record that the leases hold vast quantities of commercial phosphate ore, which defendants' development of the adjoining, similar property demonstrates can be developed at a substantial profit." [Petition at 10 n.1.] As Mr. Aro acknowledged, without performing the 1985 proposed exploration program, Ashley had not established that it even had "proven reserves." Ashley never determined whether its ore was "commercial," either in terms of ore quality or the viability of its alleged mining venture. The existing Vernal mine could not substantiate the viability of Ashley's alleged prospective mine. Despite operating at lower costs than Ashley could have during the time it was owned by Chevron, the Vernal mine was not viable as a source of phosphate concentrate for fertilizer

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Ashley never performed any marketing studies It never obtained any purchase commitments or entered into any sales contracts, which is the only way to establish a price for the sale of phosphate concentrate (due to a lack of a public or "spot" phosphate concentrate market). Mr. Archer allegedly talked to several phosphate fertilizer producers about their interest in purchasing phosphate concentrate, but never discussed price or quantity. Ashley never investigated or negotiated any freight costs for the rail transport of concentrate from Rock Springs to any fertilizer producer, despite the fact that such costs were a critical factor for determining the delivered cost of its product and, therefore, whether its proposed mining venture would be viable.

Ashley estimated it would cost $67 million to develop the leases in 1992, but never sought third-party financing. Ashley never was in a position to obtain financing without at least a Type 3 feasibility study.

Ashley failed to consummate a single contract needed to develop or operate a mine. It never obtained a mining permit, and lacked sufficient data to be able to submit a mining permit application. Ashley never obtained any of the numerous other permits that were required to develop and operate a mine, including environmental and building permits. Ashley never obtained any of the necessary right-of-ways for siting a milling and beneficiation plant at Vernal or a pipeline receiving and rail loading facility in Rock Springs.[12]

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producers. Chevron's operating costs and shipping costs exceeded the amount other western fertilizer producers were willing to pay.

[12] It is not clear to what Ashley refers when it asserts that, as of 1986, it and Chevron "shared access rights to a federal right-of-way

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Ashley never investigated the option of trucking phosphate concentrate to either Rock Springs or any other available railhead despite having a trucking company (Chevron's trucking vendor) solicit its business. There is no evidence that Ashley could have sold phosphate concentrate at any volume, let alone the volume Chevron was contemplating when it decided to build the pipeline rather than truck concentrate for its project.[13]

In 1991, in response to Mr. Archer's inquiry about obtaining a mining permit for the leases, Mr. Aro wrote to Mr. Archer attaching several letters written over the previous six years which addressed the numerous actions that had to be taken to obtain a mining permit and develop the leases, none of which were ever performed. Referring to those letters, Mr. Aro wrote to Mr. Archer, "It can be seen that there is a tremendous amount of work to be done to fully permit and develop this property."

As late as October 1993, after Chevron had divested itself of the pipeline and after Ashley had been pursuing litigation for seven years, Mr. Aro wrote a note complaining

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connecting the [Vernal] field to a railhead." [Petition at 3.] Ashley never raised this point at any time below. In any event, the record is clear that Ashley never had an ownership right in the pipeline or the pipeline right-of-ways.

[13] Instead, the record shows that there was no demand for third-party sales of phosphate concentrate from any new mine located in the western United States after July 1988. Ashley misstates the record when it variously asserts that the pipeline access was "essential to its development" or "an essential common carrier." [Petition *seriatim*.] Ashley never investigated the other transportation means that were available. Simply because the pipeline was the only option in actual use did not make it "essential" for market access. *See supra* p. 5 and note 5.

of Ashley's emphasis on litigation to the exclusion of development. Mr. Aro wrote:

> I have felt for some time that the level of *legal effort* far exceeds the level of *technical data* that is essential to verifying the reserves and costs. Without "proven" reserves and "acceptable" costs, the legal arguments could be hypothetical and meaningless. At present time: 1-No proven reserves, only prob[able] & prosp[ective]. 2-No detailed estimate of capital costs and operating costs. 3-No definition of metall[urgy], needed for conceptual plant design.

Ashley pursued litigation in lieu of development to avoid forfeiture of the leases under the State of Utah's requirement that it diligently develop the leases. Ashley repeatedly justified its lack of development to the State on the grounds that, in lieu of development, it was pursuing litigation.

Mr. Archer testified that Ashley never intended to develop the leases absent it obtaining an ownership interest in the pipeline.[14] This lack of intention (and the lack of a market) is reflected in the fact that ***Ashley still has not developed a mine to the present day***, despite the fact that, in January 1999, the SF Respondents filed a fourth pipeline tariff that recovers only operating expenses. Thus, since January 1999, Ashley could use the pipeline without paying anything for the cost of its original construction (return on capital investment).

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[14] Ashley misstates the record when it asserts this testimony did not exist. [Petition at 24 n.2.] Mr. Archer's testimony is part of the record.

III. PROCEDURAL HISTORY

A. Initiation Of The Underlying District Court Action

Having already brought litigation before the Interstate Commerce Commission ("ICC") to force Chevron to file a formal tariff despite its utter lack of preparation to compete, on June 19, 1989 (the day before Chevron's first formal tariff was to go into effect), Ashley filed suit against Chevron in the United States District Court for the District of Utah. Ashley asserted several claims under the Sherman Antitrust and Clayton Acts. Each claim was based on the core allegation that the pipeline was an "essential facility" needed to access the railhead at Rock Springs such that Chevron's offer of allegedly unreasonable (excessive) pipeline tariffs operated as a barrier to Ashley's entry into an alleged market for third-party sales of phosphate concentrate to fertilizer producers. Ashley sought lost profit damages under Section 4 for its allegedly thwarted mining venture. The State of Utah also joined as a plaintiff, suing merely in its capacity as Ashley's lessor and asserting claims that were entirely derivative of Ashley's claims.

B. The Rate Reasonableness Litigation Before The ICC/STB

Shortly after the lawsuit was initiated, the parties stipulated that the ICC should determine the tariff reasonableness issue and the District Court stayed the action pending the ICC's determination. For the next seven years, the parties litigated the tariff methodology and reasonableness before the ICC and then its successor agency, the Surface Transportation Board ("STB"). The SF

Respondents were joined in the ICC/STB action after they purchased the pipeline from Chevron in 1992.

In 1996, the STB issued a decision that applied only to the pipeline. The STB decision did not establish an allowable tariff for the pipeline but, instead, established a "framework" for determining tariff "reasonableness," which depended upon whether there was a cumulative over-collection or under-collection using actual pipeline volumes and tariff rates over the expected 20-year lifetime of the pipeline.[15] The STB set forth several volume scenarios in its decision, some of which showed a 20-year over-collection, but expressly stated that it was up to the District Court to determine what actual volumes were and that the District Court was not bound by any of the STB's scenarios. The STB expressly stated that, "Our role is simply to assist the court by presenting a framework for addressing the narrow issue that is the subject of our primary jurisdiction."

After the STB issued its decision, the District Court lifted the stay. Ashley promptly amended its complaint to join the SF Respondents as defendants.

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[15] Ashley misstates the record when it suggests that the STB required that pipeline tariffs not exceed "the highest price competition would allow." [Petition, "Questions Presented" No. 2.] Under the STB's "framework," whether the pipeline tariffs were reasonable depends upon comparing: (1) revenues generated under the pipeline tariffs (which depends upon actual tariffs in place and actual volumes); and (2) allowable revenues over a 20-year period starting on December 1, 1986. Allowable revenues were calculated to provide for a return on capital and recovery of operating expenses. If tariff revenues under proven volumes exceed allowable revenues on a cumulative basis over the 20-year period – *i.e.*, there was a 20-year cumulative over-collection – then the tariffs would be unreasonable to the extent of the over-collection.

C. The District Court's Grant Of The Respondents' Motions For Summary Judgment

The SF Respondents moved for summary judgment on all of Ashley's claims on the grounds that: (1) Ashley lacked antitrust standing; and (2) the pipeline tariffs were reasonable and, therefore, not exclusionary. In July 2000, the District Court granted the SF Respondents' motion for summary judgment on each of the grounds advanced by the SF Respondents and dismissed all of Ashley's claims against the SF Respondents with prejudice. The District Court ruled that Ashley lacked the demonstrated preparedness required to have antitrust standing.[16]

Thereafter, Chevron made two motions for summary judgment on all of Ashley's claims, one on the ground that Ashley lacked antitrust standing and the second on the ground that Ashley could not prove antitrust liability because the tariffs were not exclusionary, the pipeline was not an "essential facility," and Chevron lacked monopoly power in the alleged relevant phosphate concentrate market. In January 2001, the District Court granted both of Chevron's motions for summary judgment for the same reasons it granted the SF Respondents' motion for summary judgment, and dismissed Ashley's claims against Chevron with prejudice.

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[16] The District Court also ruled that the pipeline tariffs were "reasonable" under the STB decision such that the tariffs were not exclusionary. As a result, Ashley misstates the record by stating as fact throughout its "Questions Presented" and Petition that the tariffs were "illegal" and have been found to be unreasonable. [*See, e.g.*, Petition at 4-5.] The District Court ruled directly otherwise.

D. The Court Of Appeals' Decision

Ashley appealed to the Tenth Circuit Court of Appeals the grant of the Respondents' motions for summary judgment and the Court of Appeals affirmed the District Court's decision solely on the ground that Ashley lacked antitrust standing. *Ashley Creek Phosphate Co. v. Chevron U.S.A. Inc.*, 315 F.3d 1245 (10th Cir. 2003).

In deciding that Ashley had not shown antitrust standing, the Court of Appeals first held that Ashley did not satisfy the "preparedness" prong of the "intent and preparedness" test used for determining antitrust standing of a plaintiff who claims an antitrust violation thwarted an inchoate business. *Ashley Creek*, 315 F.3d at 1254-55 (citing *Curtis v. Campbell-Taggart, Inc.*, 687 F.2d 336, 338 (10th Cir. 1982)).[17] Like the District Court, the Court of Appeals assumed Ashley's intent, but held that Ashley lacked the required preparedness based upon the following facts that were supported by the record on appeal: (1) although Ashley estimated it would cost in excess of $67 million for it to enter the phosphate concentrate market, Ashley had only a few thousand dollars and had done nothing to obtain financing; (2) Ashley had completed only a limited "Type 1" feasibility study, while

[17] As observed by the Court of Appeals, under the preparedness prong of the "intent and preparedness" test, a court reviews whether a plaintiff had the required preparedness by evaluating four "key" factors: "(1) ability to finance the business and purchase the necessary facilities and equipment; (2) consummation of contracts needed for the proposed venture; (3) affirmative actions by the plaintiff to engage in the proposed business; and (4) the background and experience of the plaintiff in the prospective business." *Ashley Creek*, 315 F.3d at 1254-55 (citing *Curtis*, 687 F.2d at 338).

at least a "Type 3" or "Type 4" feasibility study was required to secure financing; (3) Ashley had not consummated any of the contracts necessary to operate a phosphate mine, including any sales contracts (Ashley had never discussed price with any prospective customer and had only negotiated, but never entered, a water supply contract); (4) Ashley never obtained any of the many permits necessary to develop and operate a mining operation; (5) Ashley lacked the necessary experience and background in the business of selling phosphate concentrate; and (6) Ashley continued to fail to take any preparatory steps after Chevron and the SF Respondents filed a series of successively lower tariffs. *Id.* at 1255-58.

The Court of Appeals rejected as insufficient and largely unsupported Ashley's contention that it satisfied the preparedness test based upon a few "preparatory" steps that Ashley asserted it undertook, including: (1) its allegedly having obtained a water supply contract (which the record showed did not happen); (2) preliminary design of a mining operation (in a permit application which was rejected on multiple grounds and never further pursued); (3) performing the "preliminary" Type 1 study (which was at least two steps removed from a bankable feasibility study); (4) allegedly commencing initial negotiations with potential customers (which consisted of talks with only one customer and no discussion of price or quantity); and (5) allegedly commencing inquiries regarding financing (of

which there was no evidence in the record).[18] *Id.* at 1256-67.

Second, the Court of Appeals held that Ashley's lack of preparedness was not excused under a "futility exception" to the preparedness test. *Id.* at 1258. The Court of Appeals recognized that several other courts had adopted a "futility exception" to the preparedness test, under which the preparatory step of making a demand or request to a defendant can be excused as futile due to the antitrust violation. *Id.* The Court of Appeals acknowledged its willingness to adopt a similar exception. *Id.* However, without analyzing the parameters of the exception that it would adopt, the Court of Appeals held that the exception would not excuse Ashley's failure to undertake even the most basic of preparatory steps of determining whether: (1) there was a market; (2) the exact nature of its reserves; and (3) its own costs within a reasonable margin, so as to determine whether its alleged mining venture would have been viable at even a zero pipeline tariff rate. *Id.*

Third, the Court of Appeals decided that Ashley had not shown an antitrust injury to property. *Id.* at 1260. The Court of Appeals rejected Ashley's argument that, based merely upon its ownership of its phosphate leases, it had antitrust standing to sue for recovery of lost profits for an

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[18] Ashley's assertion that its statement of facts in response to Respondents' motions for summary judgment, including its assertion that Ashley undertook all possible preparatory steps before a tariff was due, was "uncontested" and, thus, admitted [Petition at 24 n.2], is blatantly false, as observed by the Court of Appeals. Ashley's assertion that the Court of Appeals made findings based upon disputed evidence [*id.*] also is not supported by the record.

allegedly thwarted potential mining business. *Id.* at 1259-60. While recognizing that Ashley's leases were "property," the Court of Appeals observed that Section 4 grants standing not for mere "property" but for "injury to property." However, Ashley was not claiming that its title to the leases was in any manner clouded by the alleged antitrust violation. *Id.* Instead, the Court of Appeals observed, Ashley claimed injury to an alleged inchoate business that would use the leases. *Id.* Therefore, the Court of Appeals held, to have standing to recover lost profits for its alleged inchoate business, Ashley had to satisfy the "intent and preparedness" test to prove its antitrust standing. *Id.* The Court of Appeals stated that this holding was limited to the "narrow circumstance" where a plaintiff claimed its injury flowed from its claim that it would have used its property as part of a prospective business operation. *Id.* at 1260 & n.16.

ARGUMENT

The Court of Appeals' decision regarding Ashley's lack of antitrust standing does not provide a basis for grant of the Petition because the decision applied settled law in an analysis limited in application to Ashley.

A. The Court Of Appeals' Holding That Ashley Had Not Shown An Antitrust Injury To Business Does Not Provide A Basis For Grant Of The Petition Because The Court Of Appeals Applied Settled Law

The "intent and preparedness" test relied upon by the Court of Appeals is an established analytical tool for

determining both the antitrust injury and the direct causal nexus components of antitrust standing. *Bubar v. Ampco Foods, Inc.*, 752 F.2d 445, 450 (9th Cir. 1985); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 994 (D.C. Cir. 1977); *Jayco Sys., Inc. v. Savin Bus. Mach. Corp.*, 777 F.2d 306, 313-314 (5th Cir. 1985); *Cable Holdings of Georgia, Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1562 (11th Cir. 1987). Where a plaintiff claims an antitrust violation was a barrier to its going into a business, the plaintiff has no operating business that it can show was injured. Therefore, only if that plaintiff can show a demonstrated intent and preparedness to compete can the plaintiff prove a non-speculative business interest that in fact was injured as a result of an antitrust violation, as required to prove antitrust standing. *Id.* The test recognizes that not all who claim to be thwarted competitors are valid antitrust plaintiffs and that, instead, most businesses fail for reasons unrelated to antitrust policy, and emphasizes that it takes more than a mere hope or expectation to become a competitor to have standing to recover treble lost profits under the antitrust laws for a business that never existed. *Id.*; *see also Denver Petroleum Corp. v. Shell Oil Co.*, 306 F. Supp. 289, 307-08 (D. Colo. 1969) (stating that mere hope or expectation is insufficient).

The "intent and preparedness" test relied upon by the Court of Appeals has been a settled test of antitrust standing since 1908. *See Pennsylvania Sugar Ref. Co. v. American Sugar Ref. Co.*, 166 F. 254, 260 (2d Cir. 1908). The test has been used by this Court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 126-129 (1969). The test has been used by the Tenth Circuit since 1982. *See Curtis*, 687 F.2d at 338. In addition to the Tenth Circuit, the test has been adopted by every circuit considering the

issue of a plaintiff's antitrust standing when the plaintiff claims its prospective business was thwarted by an antitrust violation.[19] There is no conflict amongst the circuits regarding the "intent and preparedness" test relied upon by the Court of Appeals.

This Court and several circuits have recognized a limited "futility exception" to the preparedness test. *See Hazeltine*, 395 U.S. at 120 n.15; *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1572 (11th Cir. 1991), *cert. denied*, 506 U.S. 903 (1992); *Fleer Corp. v. Topps Chewing Gum, Inc.*, 415 F. Supp. 176, 179-80 (E.D. Pa. 1976). The Tenth Circuit indicated in its decision in this matter that it too would be willing to adopt such an "exception." Therefore, the Court of Appeals' decision as regards the "futility exception" also does not present any conflict amongst the circuits.

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[19] *Hecht*, 570 F.2d at 994; *Indium Corp. of America v. Semi-Alloys, Inc.*, 781 F.2d 879, 882 (Fed. Cir. 1985), *cert. denied*, 479 U.S. 820 (1986); *Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1, 9 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980); *Pennsylvania Sugar*, 166 F. at 260; *Triangle Conduit & Cable Co. v. National Elec. Prod. Corp.*, 152 F.2d 398, 399 (3d Cir. 1945); *North Carolina Elec. Membership Corp. v. North Carolina Power & Light Co.*, 780 F. Supp. 322, 340 (M.D.N.C. 1991), *aff'd*, 995 F.2d 1063 (4th Cir. 1993); *North Texas Producers Ass'n v. Young*, 308 F.2d 235, 238-243 (5th Cir. 1962), *cert. denied*, 372 U.S. 929 (1963); *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 395-396 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 475 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983); *Central Telecomm. Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 727-729 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987); *Stearns v. Tinker & Rasor*, 252 F.2d 589, 606 (9th Cir. 1957); *Cable Holdings of Georgia, Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1562-63 (11th Cir. 1987).

Ashley apparently does not dispute its need to satisfy the "intent and preparedness" test or the "futility exception." Instead, Ashley merely argues that the Court of Appeals incorrectly applied correct rules of law because Ashley allegedly did all it could absent an offer of allegedly non-exclusionary tariffs.[20] This argument does not raise an important question of federal law. The Court of Appeals' decision, which held that Ashley did not satisfy the preparedness test and did not fall within an exception, was fact specific to Ashley. Even (incorrectly) assuming error, any impact would be limited to Ashley. Indeed, any error was beyond the purview of antitrust laws because Ashley never showed any impact on competition. Instead, Ashley relied upon only its alleged exclusion, *see Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985); *Brown Shoe Co. v. United States*, 370 U.S. 294, 370-74 (1962), and neither proved that the pipeline was an essential facility nor established Chevron's monopoly

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[20] Contrary to Ashley's argument, the Court of Appeals did not require Ashley to show that its alleged mining venture was profitable, or the amount of its profits, to show an "injury to business." Instead, the Court of Appeals merely recognized that ***where feasibility is an issue*** (such as in the present case), a plaintiff claiming its business was thwarted by an antitrust violation must prove that, at the time of the alleged violation, there was a reasonable basis for determining that the proposed business was feasible in order to prove that the proposed business was an actual business interest that in fact was thwarted by the antitrust violation rather than due to infeasibility. This is in accord with settled law. *See, e.g., Cable Holdings*, 825 F.2d at 1562; *Gas Utilities Co. of Ala., Inc. v. Southern Natural Gas Co.*, 825 F. Supp. 1551, 1572 (N.D. Ala. 1992); *Practice Perfect, Inc. v. Hamilton County Pharm. Ass'n*, 732 F. Supp. 798, 803 (S.D. Ohio 1989).

power in the alleged relevant phosphate concentrate market.

Moreover, Ashley continues to misconstrue the "futility exception" and ignores its own utter lack of demonstrated preparedness. The "futility exception" recognized by this Court and the authorities relied upon by Ashley merely acknowledge that a plaintiff's failure to demand a contract or license from the defendant can be excused where the demand was futile, *if* the plaintiff otherwise shows demonstrated preparation to compete. This "exception" does not obviate the need to otherwise show intent and preparedness to compete, as shown by the fact that every decision recognizing the "futility exception" did so in the context of applying the settled intent and preparedness test.[21] *See Hazeltine*, 395 U.S. at 120 n.15; *Thompson*, 934 F.2d at 1572; *Fleer*, 415 F. Supp. at 179. By arguing that the alleged antitrust violation prevented its preparation,

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[21] Ashley argues that the District Court and Court of Appeals erred in refusing to consider its expert witness damage report on the issue of its preparedness. Neither court addressed the issue. Ashley cites no authority requiring the consideration of its damage study on the issue of its preparedness so as to raise an issue for review by this Court. Instead, the authorities indicate the contrary. *See, e.g., Hayes v. Solomon*, 597 F.2d 958, 975 (5th Cir. 1979). An expert damage study is only relevant on the issue of damages and, as Ashley itself points out, there is a distinction between standing and damages. A damage study necessarily is a hypothetical construction of what a plaintiff "could have done," whereas the "intent and preparedness" test necessarily focuses on the actual status of the plaintiff's intent and preparedness at the time of the alleged antitrust violation. *See, e.g., Bubar*, 752 F.2d at 452; *Jayco Sys.*, 777 F.2d at 313-14 & n.21; *Practice Perfect*, 732 F. Supp. at 803. Moreover, as Ashley admits in its Petition, its damage study did not identify any allegedly lost sales by it before 1994 – two years after Chevron sold the pipeline.

Ashley improperly tries to establish its standing based merely upon the allegation of an antitrust violation.

B. The Court Of Appeals' Holding That Ashley Had Not Shown An Antitrust Injury To Property Does Not Provide A Basis For Grant Of The Petition Because The Holding Is Based Upon Settled Law

Ashley argues that the Court of Appeals' "rule" on the injury to property issue shatters several precedents and is far-ranging in consequence. Ashley's arguments are without merit because each mischaracterizes the Court of Appeals' "rule."

Ashley argues that the Court of Appeals' "rule" eliminates the injury to property prong of Section 4. It does not. In deciding that Ashley had not shown an antitrust injury to property, the Court of Appeals held that, because Ashley sought to recover lost profits for an allegedly thwarted business, it could not rely upon mere ownership of the property (its phosphate leases) it claimed it would have used to develop the mining business to prove its antitrust standing. *Ashley Creek*, 315 F.3d at 1260. Rather, Ashley had to satisfy the settled "intent and preparedness" test. To the extent this unremarkable holding establishes a "rule," the "rule" merely applies settled principles of antitrust standing in a particular set of factually "narrow circumstances." *See id.* at 1260 & n.16. It does not provide a basis for a grant of Ashley's Petition. It leaves intact the full range of situations where a plaintiff has antitrust standing because the plaintiff seeks to recover for antitrust injury to its property, including the situation in *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

The Court of Appeals merely applied the settled antitrust standing rule that a plaintiff must establish an antitrust injury and a direct causal link between the injury and the antitrust violation, *see, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), to the "narrow circumstance" where a plaintiff claims injury to an inchoate business that would have used the subject property. *Ashley Creek*, 315 F.3d at 1260. In such a narrow circumstance, the Court of Appeals recognized, a plaintiff, such as Ashley, does not claim or show any injury to its property alone – no clouding of title, or deprivation of title. Therefore, the plaintiff cannot rely upon the mere ownership of the property to prove its standing because it does not thereby prove an injury caused by an antitrust violation. The only real use or value of Ashley's State mining leases was to facilitate a mining business. If the plaintiff cannot show it was prepared to embark upon that business, or for that matter that the purported business was even viable, the leases had no real value before any alleged antitrust violation occurred.

If, as Ashley contends, a plaintiff could rely upon mere possession of property that it claims it would have used to go into a business it cannot prove was viable, then the antitrust standing rule requiring an antitrust injury directly caused by an antitrust violation would be eviscerated. Under the rule proposed by Ashley, any property interest, even the ownership of a vehicle, would provide a plaintiff with standing to claim lost profits despite the lack of any showing of an actual business interest that in fact was injured by an antitrust violation.

Ashley argues that the Court of Appeals' "rule" ignores that a plaintiff's "rights of access" and "right to use" its property to develop a business are property rights such

that any injury to them can afford standing. Ashley relied upon its leases to establish its antitrust standing in the courts below rather than a claimed "right of access." Ashley presents no exceptional circumstances for this Court to review the issue originally.

Moreover, Ashley does not claim injury to any right qualifying as a property right independent from injury to its allegedly thwarted mining venture. Indeed, the record is clear that Ashley owned and still owns the leases and nothing has affected its right of access to that property. *See Utah v. Andrus*, 486 F. Supp. 995, 1002 (D. Utah 1979). Ashley claims injury strictly to its allegedly thwarted mining venture such that the "rights" it now asserts, its "right of access" and "right to use" its leases, merely are "rights" to go into business. As the Court of Appeals' "rule" recognizes, for a plaintiff to have standing to claim an antitrust violation interfered with its "right" to go into business, it is settled law that the plaintiff must satisfy the "intent and preparedness" test.

Ashley also argues that the Court of Appeals' "rule" conflicts with the rules that: (1) any injury from an antitrust violation is sufficient to show standing, and (2) the issue of the degree to which the value of property is impaired by an antitrust violation is a question of damages, not standing. There is no such conflict. Contrary to Ashley's argument, the Court of Appeals required Ashley to satisfy the "intent and preparedness" test not because it failed to show either a sufficient injury to its property or the ultimate success of its allegedly thwarted mining venture, but because it was claiming injury to an alleged

inchoate business interest of which the mining leases were nothing more than an integral part.

CONCLUSION

For the foregoing reasons, Chevron respectfully submits that Ashley's Petition for Writ of Certiorari be denied in full.

DATED this 1st day of August, 2003.

Respectfully submitted,

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